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No. 194

In the

Supreme Court of the United States

OCTOBER TERM 1964

FRANK W. CASS AND ROBERT W. STRAUSS,
Petitioners,

v.

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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PETITION FOR REHEARING

This Court, on Octob : 12, 1964, denied the Petition for Writ of Certiorari. Pursuant to Supreme Court Rule 58.2, Petitioner Frank W. Cass prays that a Petition for Rehearing be granted and that this Court grant certiorari and vacate the judgment below and remand the case for further proceedings in view of the subsequent decision by the court below in *In Re Casco Chemical Co.*, 335 F. 2d 645 (5th Cir. 1964).

GROUNDS FOR REHEARING

Subsequent to the filing of the Petition for Certiorari and the Brief in Opposition, the Fifth Circuit opinion in *In Re Casco Chemical Co.*, 335 F. 2d 645 (1964) was reported. For reasons that follow it is submitted such decision is in conflict with the instant case. The Petition for Rehearing is limited to this issue. Although a conflict *within* a circuit is ordinarily not a basis for this Court to grant certiorari, where the conflict occurred subsequent to the filing for certiorari this Court has granted rehearing and remanded the cause back to the court of appeals for determination. Such procedure would be necessary as it is doubtful whether the Court of Appeals at this date would have jurisdiction to otherwise entertain a Petition for Rehearing.

In *United States Ex Rel. Robinson v. Johnson, Warden*, 316 U.S. 649, this Court held:

> "*Per Curiam:* The motion for leave to file a second petition for rehearing is granted. The second petition for rehearing is granted. The order denying certiorari, 314 U. S. 675, is vacated, and the petition for writ of certiorari is granted. The motion for leave to proceed *in forma pauperis* is also granted. In view of the conflict of views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case (See *Robinson v. Johnston*, 118 F. 2d 998, 1001, and *Crockett v. United States*, 125 F. 2d 547, 548, 549), and in view of this Court's decision in *Waley v. Johnston*, ante, p. 101, reversing 124 F. 2d 587, the judgment is vacated, and the case is remanded to the Circuit Court of Appeals for further proceedings, including leave to petitioner to apply for a hearing before the court *en banc*. See *Textile Mills Corp. v. Commissioner*, 314 U. S. 326."

In other instances, this Court has determined the matter without remanding. See Stern & Gressman, Supreme Court Practice (3rd Ed. 1962) p. 130.

BASIS OF CONFLICT

In the case at bar Petitioner filed a motion for relief under Rule 60(b) from a final judgment that had awarded the Respondent some $80,000. Petitioner also sought discovery. The federal district court, however, granted Respondent's motion to quash Petitioner's Rule 60(b) Motion, and Respondent's motion to strike Petitioner's Rule 33 Interrogatories. The motion of Petitioner for default judgment under Rule 37(d) for willful failure to answer the interrogatories and in the alternative to direct Respondent under Rule 37(a) to answer the interrogatories were denied. The district court quashed the 60(b) Motion and struck the discovery because the state court receiver of the Petitioner's partnership had not joined in the 60(b) Motion and then after formal joinder by the receiver denied relief because the fraud if any had been committed in state court. On Appeal, Petitioner pointed out the state court hearing merely authorized and directed the receiver to settle the federal court suit and that Respondent's claim was not liquidated in state court. (Respondent was not a party to the state proceeding.) And of course, no relief from the final federal court judgment regular on its face could be obtained in state court. Petition appeal was predicated on (1) the *60(b) Motion stated a valid claim on which relief could be granted* and (2) *that a party to Rule 60(b) Motion is en-*

titled to use the federal rule of discovery in preparation of his case. The Fifth Circuit ruled against the petitioner and affirmed. (See full statement of case in Petition for Certiorari):

The subsequent decision of the Fifth Circuit in *In Re Casco*, 335 F. 2d 645 (1964), appears to be *contra*. Therein the Fifth Circuit was concerned with "an independent proceeding brought under Rule 60(b)" more than one year after the judgment had become final. To decide the limitations issue it was necessary for the court to consider the legal sufficiency of the complaint—the identical issue to the case at bar. The Fifth Circuit also fully recognized that the moving party would have the right to use the federal rules of discovery.

Although the two cases are not identical in context, it is respectfully submitted that no *substantial* basis of distinction exists.

The Fifth Circuit in *In re Casco* ruled, in relevant part:

> "In view of the action of the District Court, see note, 51, supra, we have at this stage a single, simple question. That question is whether the one-year limitation in F. R. Civ. P. 60(b)(1), (2), (3) likewise bars an independent action. And yet the parties insist on arguing, briefing and re-briefing at length a number of matters not yet present, and in no way yet determined by the District Court.
>
> "At the outset, before discussing these extraneous matters, we think that in testing its legal sufficiency under the test articulated in *Conley v. Gibson*, 1957, 355 U. S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80; *Arthur H. Richland Co. v. Harper*, 5 Cir., 1962, 302 F. 2d 324, it

is too early to read the complaint as though it is confined to grounds (1), (2), and (3) of rule 60(b). If there are uncertainties from these general allegations, there are ample means within the arsenal of pre-trial discovery, interrogatories, requests for admission, depositions, and the like, to ascertain just what is charged, especially under the broad language of "other good and sufficient reasons * * * justifying relief from the operation of said judgment" which might well encompass grounds (4) and (6).[18]"

"[18] In the process of this exploration, it should be kept in mind that rule 60(b) is to be given liberal construction. United States v. Gould, 5 Cir. 1962, 301 F. 2d 353; Michigan Surety Co. v. Service Machinery Corp., 5 Cir. 1960, 277 F. 2d 531; Serio v. Badger Mut. Ins. Co., 5 Cir., 1959, 266 F. 2d 418, cert. denied; 361 U. S. 832, 80 S. Ct. 81, 4 L. Ed. 2d 73; 3 Barron & Holtzoff Sec. 1332 n. 9 (Wright Supp. 1963).

"Ground (6) is, and is meant to be, flexible, and in its operative application relief may be broadened by virtue of grounds (1), (2), (3). See, e.g., Gros Inc. v. W E. Grace Mfg. Co., 5 Cir. 1963, 320 F. 2d 594 (bringing intrinsic as well as extrinsic fraud within (6); 3 Barron & Holtzoff Sec. 1326 n. 64 1 Sec. 1329 nn. 72.7, 72.9 (Wright Supp. 1963)." 335 F. 2d 645, 650-651.

Although the Fifth Circuit now acknowledges that Rule 60(b) covers both extrinsic and intrinsic fraud (see their fn. 18, *supra*), the Respondent in the Fifth Circuit and in this Court relied on cases that were decided prior to adoption of Rule 60(b) and at which time extrinsic fraud was required (see, e.g. Brief in Opposition, p. 5).

In the case at bar, no trial between the Petitioner and the Respondent occurred in the state court hearing authorizing the receiver to settle; no trial on the merits occurred in federal court suit that awarded Respondent some $85,000 (Petitioner-Cass requested a continuance to obtain an attorney which was denied. Cass' attorney did not appear at the

final hearing because allegedly his life and the life of his family had been threatened. See affidavit of Petitioner Cass in Appendix A to Response of Appellant-Petitioner on Petition for Rehearing before the Fifth Circuit. Tr. ...); and no hearing in the district court below was held other than on the right of discovery and Respondent's motion to quash the 60(b) Motion. Of course, although Respondent effectively opposed all discovery, Respondent's counsel has argued again that no fraud, etc. was committed. (See, e.g. Brief in Opposition, p. 5) In spite of such assurance Petitioner would like to avail himself of discovery and then obtain a hearing on the merits of his 60(b) Motion. Under the subsequent decision by the court below in *In re Casco*, 335 F. 2d 645, Petitioner would be afforded such rights: "If there are uncertainties from these general allegations, there are ample means within the arsenal of pre-trial discovery, interrogatories, requests for admission, depositions, and the like, to ascertain just what is charged * * *" 335 F. 2d at 650. Petitioner's Rule 60(b) motion (set out appendix B to Petition for Certiorari) alleged far more than, as characterized by the Fifth Circuit, that the Respondent was "merely" over-paid and certainly contained more substantial allegations than the Fifth Circuit held to be sufficient in *In re Casco, supra.*

CONCLUSION

Because of the subsequent decision of the Fifth Circuit, it is respectfully requested that this Court grant the Pe-

tition for Rehearing and in reference to the Petition for Writ of Certiorari, such further orders as are appropriate.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, William VanDercreek, a member of the bar of this Court, certify that the foregoing Petition for Rehearing from the order of this Court denying the Petition for Writ of Certiorari is filed in accordance with Supreme Court Rule 58.2 and is presented in good faith and not for delay, and is restricted to the effect of the subsequent decision by the Fifth Circuit in *In Re Casco*, 355 F. 2d 645 (1964).

WILLIAM VANDERCREEK

CERTIFICATE OF SERVICE

This is to certify that pursuant to Supreme Court Rule 33.3(b) a copy of the foregoing Petition for Rehearing has been duly mailed to William J. Harnisch and John L. Roach, attorneys for Respondent.

WILLIAM VANDERCREEK